

Date: September 7, 1995

BQC-95-043  
(Amends BQC-95-023)

TO: Nursing Homes

NH 30

FROM: Judy Fryback, Director  
Bureau of Quality Compliance

SUBJECT: Citing Past Incidents of Noncompliance

**OVERVIEW:** This memo describes a change made to the Bureau's citing guidelines. This change affects the citing of incidents of noncompliance that occur between two standard surveys at which a facility was found in substantial compliance with the regulation.

The Bureau's citing guidelines (BQC-95-023) direct surveyors NOT to cite a federal deficiency if an incident happened in the past, was corrected, and the survey team believes that the incident will not reoccur because a quality assurance program is in place. These guidelines are now being amended to incorporate the instructions found in the State Operations Manual (SOM) at 7510.

According to the SOM, survey teams, at a standard survey, may cite past noncompliance in cases where:

- \* the noncompliance occurred between the last standard survey and the current survey,
- \* the facility was/is in compliance with the regulation at the time of both standard surveys, and
- \* the past noncompliance was "egregious."

"Egregious" is not defined in the regulations, although the Health Care Financing Administration (HCFA) uses the term in its Discussion of Public Comments. Based upon this, and borrowing from the Occupational Safety and Health Administration's (OSHA) "Egregious Penalty Policy," we are defining "egregious" to mean a situation in which:

1. The facility had, or through proper diligence should have had, knowledge of the noncompliance at the time of its existence (e.g., through previous citation history, repeat deficiencies, accident experience, or widely publicized agency enforcement), AND
2. The facility through voluntary action or inaction made little or no reasonable effort to eliminate the noncompliance, AND
3. The noncompliance created a situation that would fall into boxes F, H, I, J, K or L on the federal enforcement grid. (These are the shaded boxes on the enforcement grid that define substandard quality of care; egregious past noncompliance, however is not limited to the three regulatory groupings that define substandard quality of care.) OR

The facility has a history of three or more prior deficiencies of the same regulation – above the level of substantial compliance – during the previous three years.

A survey team that finds a past incident of egregious noncompliance should discuss the situation with its supervisor and make meticulous documentation of its evidence.

Egregious incidents of past noncompliance are to be cited at the bottom of the HCFA-2567, under tag 999,

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under a heading of "Past Noncompliance." The survey team should type in the appropriate tag, CRF or LSC number, and a verbatim quotation of the regulation, followed by a statement, "This requirement was not met as evidenced by:". The deficiency should be written in accordance with the *Principles of Documentation*. The dates of the past noncompliance are to be noted in the deficiency (under "Dates of Violation:") AND entered on the HCFA-462L.

HCFA (for SNFs and SNF/NFs) or the state (for NFs) may impose a civil money penalty for the number of days of past noncompliance since the last standard survey.

The Bureau's citing guidelines in relation to citing state violations for past noncompliance remain unchanged. Past incidents of noncompliance may be cited under the state codes regardless of the degree of "egregiousness."

Please contact your Regional Field Operations Director if you have questions.

JF:BH

cc:-BQC Staff

- Office of Legal Counsel
- Ann Haney, DOH Admin.
- Kevin Piper, BHCF Dir.
- HCFA, Region V, D. Wolfe
- Illinois State Agency
- Ohio State Agency
- Michigan State Agency
- Indiana State Agency
- Minnesota State Agency
- WI Coalition for Advocacy
- Serv. Employees Inter. Union
- WI Counties Assn.
- WI Assn. of Homes & Serv/Aging

- Admin., Division of Care  
and Treatment Facilities
- WI Assn. of Hospital SW  
and Discharge Planners
- Bd. on Aging & Long Term Care
- Bur. of Design Prof., DRL
- Bureau of LTS, DCS
- LTC BQC Memo Subscribers
- Secy, Dept. of Reg. & Licensing
- Director, Bureau of Aging DCS
- WI Health Care Association
- St. Med. Society (Comm. Aging...)
- WI Assn. of Medical Directors
- WI Health Info. Mgmt. Assn.